Supreme Court, U.S.
FILED
95 94 JUN 23 1995

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NO. _____

CARMEN G. SALAZAR, PETITIONER

VS.

THE PRICE COMPANY

&

DAYMON ASSOCIATES, INC., RESPONDENTS

# PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

for the Tenth Circuit

Carmen G. Salazar
P. O. Box 37383
Albuquerque, NM 87176
505/821-6855

## QUESTIONS PRESENTED

1. Whether petitioner's denial of hearing for Motion for Default and Judgment, a violation of FRCP 55(b) was a violation of Fourteenth Amendment constitutional rights.

2. Whether 28 U.S.C.A., Section 1291 allows "collateral orders to be appealed when it presents serious and unsettled questions rendering it too important to be denied review.

3. If the answer to question 2 is no, whether the Final Judgment not being included as part of the appeal process, a violation of FRAP 4(a)(2), also violated petitioners Fourteenth Amendment constitutional rights.

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NO. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

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OCTOBER TERM, 1994

Carmen G. Salazar, Petitioner

vs.

The Price Company &

Daymon Associates, Inc., Respondents

---

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

---

Petitioner, Carmen G. Salazar, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Tenth Circuit denying appeal as jurisdictionally defective, a violation of Title 28, Section 1291.

The Final Judgment issued on December 21, 1994, not being included in the appeal process is in violation of FRAP 4(a)(2).

## OPINIONS BELOW

The unpublished opinion of the Court of Appeals appears in Appendix A to this petition. The denial of the Petition for Rehearing appears in Appendix B. The orders of the Judicial Council for the Tenth Circuit appear in appendices C and D. The jurisdictional finding by the Tenth Circuit Court of Appeals appears as Appendix E. The unpublished Final Judgment of the District Court of New Mexico appears as Appendix F. The Memorandum Opinion and Order of the District Court of New Mexico appears as Appendix G.

## JURISDICTION

The Court of Appeals Opinion in this matter was filed on March 30, 1995.

A timely petition for rehearing was filed on April 12, 1995. The Court of Appeals denial of the petition for rehearing was issued on May 2, 1995 and is set forth in Appendix B. This Court's jurisdiction is invoked under Title 28, Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution is set forth in Appendix I.

## STATEMENT OF THE CASE

The United States District Court, District of New Mexico, had jurisdiction pursuant to Title 28, Section 1251.

Petitioner having met the requirements for service and proof of service under FRCP, Rule 4, including a personal trip to witness service to Daymon Associates, Inc., and three additional attempts at service made by personal server.

The proof of service filed indicated a "refusal of service." On August 16, 1994, petitioner filed a Motion for Default and Judgment against co-defendant, Daymon Associates, Inc., for failure to plead to plaintiff's complaint. A Memorandum Opinion and Order was issued on October 12, 1994, denying Motion for Default and Judgment. Petitioner rights to due process under the Fourteenth Amendment to the United States Constitution were violated, having been denied a hearing required by FRCP, Rule 55(b).

On October 20, 1994, petitioner filed a Notice of Appeal with the Tenth Circuit Court of Appeals. On November 14, 1994, the Court of Appeals issued an opinion of jurisdictional defect. On December 21, 1994, the District Court issued its Final Judgment granting defendant, The Price Company's Motion to Dismiss. Petitioner forwarded copy of judgment to the Court of Appeals on February 1, 1995, the District Court having failed to do so. On February 6, 1995 a Motion to Expedite was filed.

On March 23, 1995, the Court of Appeals dismissed appeal as jurisdictionally defective in violation of Title 28, Section 1291, and violation of FRAP 4(a)(2), requiring the appeal to now include the Final Judgment. A timely petition for rehearing was filed with the Court of Appeals. A judicial complaint was filed on March 23, 1995 by petitioner. On April 17, 1995, the Judicial Council of the United States Court of Appeals for the Tenth Circuit dismissed complaint, the Circuit Executive having excluded the Court of Appeals dismissal and the petition for rehearing. The petition for rehearing was denied on May 2, 1995. The Judicial Council of the United States Court of Appeals for the Tenth Circuit voted to confirm dismissal of judicial complaint on May 15, 1995.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reason:

This petition presents an unprecedented issue of the Appellate Court having so far departed from the accepted and usual course of judicial procedures in sanctioning a lower court's decision as to call for an exercise of this Court's power of supervision.

The issues presented to this Court for ruling is the undue influence by defendants on governmental administrative agencies, i.e., Equal Employment Opportunity Commission to suppress investigations. This influence has extended to the United States Court of Appeals, and their officials.

Where the restriction of a constitutional right is apparent, in this case the right to "procedural due process" under the Fourteenth Amendment, this Court has been disposed to grant review and to place a strict burden on those seeking to justify the constitutional

restriction.

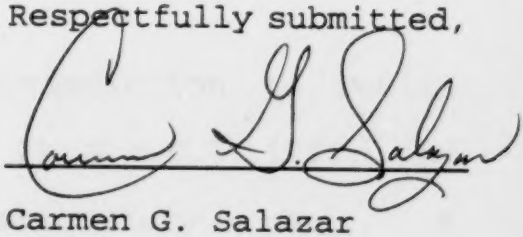
This Court should grant certiorari here to explicitly rule that defendants will not be allowed to make judicial decisions.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: July 6, 1995

Respectfully submitted,



Carmen G. Salazar
Pro Se

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CARMEN G. SALAZAR,

Plaintiff - Appellant,

vs. No. 94-2233

DAYMON ASSOCIATES, INC., PRICE CLUB, INC.,

Defendants - Appellees.

ORDER

Filed: March 30, 1995

Before TACHA, BRORBY, and HENRY, Circuit Judges.

This appeal is jurisdictionally defective because the order being appealed is not appealable.

This court has jurisdiction to review only final decisions, 28 U.S.C., 1291, and specific types of interlocutory orders. A final decision is one that disposes of all issues on the merits and leaves nothing for the court to do but execute the judgment. See Catlin v. United States, 324 U.S. 229, 233 (1945). No exception to that rule is applicable here.

The plaintiff's motion to expedite the appeal is denied as moot.

The request for the imposition of sanctions filed by defendant Daymon Associates is denied.

Because the order being appealed is not a final decision this court lacks jurisdiction to determine the merits of this appeal.

APPEAL DISMISSED.

S

Ellen Rich Reiter

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CARMEN G. SALAZAR,

Plaintiff - Appellant,

vs. No. 94-2233

DAYMON ASSOCIATES, INC., PRICE CLUB, INC.,

Defendants - Appellee.

ORDER

Entered May 2, 1995

Before TACHA, BRORBY and HENRY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service.

No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

S

Audrey F. Weigel

JUDICIAL COUNCIL OF THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE CHARGE OF

JUDICIAL MISCONDUCT No. 95-10-372-11

Before SEYMOUR, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against a magistrate judge and a district judge in this circuit. Consideration of such complaints is governed by 28 U.S.C., 372(c) and by the Rules of the Judicial Council of the Tenth Circuit Governing Complaints of Judicial Misconduct. The allegation in this complaint relate to a pro se lawsuit filed by Complainant and heard before Respondent Judges. The suit appears to be pending on appeal.

Respondent District Judge died while this complaint was pending.

Accordingly, the complaint against this respondent is dismissed pursuant to 28 U.S.C., 372 (c)(3)(B) and Misconduct Rule 4(d), which provide that a proceeding may be concluded when action on the complaint is no longer necessary because of intervening events.

Complainant charges that Respondent Magistrate Judge improperly engaged in a discussion in Complainant's absence with the attorney for the defendant and other parties in the underlying lawsuit for the purpose of discussing the case. In support of this charge, Complainant alleges that Respondent Magistrate Judge became angry with her at a scheduling conference and strongly suggested that she obtain an attorney. She points out that an order was subsequently entered denying her motion for default judgment and directing that she effect service of process upon one of the defendants in the underlying action. These allegations simply do not support Complainant's charge of improper ex parte communications by Respondent Magistrate Judge.

A charge will be dismissed as frivolous when, as here, it makes allegations that are wholly conclusory and lack any supporting facts. 28 U.S.C., 372(c)(3)(A)(iii); Misconduct Rule 4(c)(3).

The Circuit Executive is directed to transmit a copy of this Order to the Complainant and to the Respondent Magistrate Judge. The Circuit Executive shall advise the Complainant that review of the order of dismissal may be sought by filing a petition for review by the Judicial Council with the Circuit Executive within thirty days from the date of the Circuit Executive's letter transmitting this Order.

DATED April 17, 1995.

S

Stephanie K. Seymour

JUDICIAL COUNCIL OF THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE CHARGE OF

JUDICIAL MISCONDUCT No. 95-10-372-11

ORDER

Pursuant to the Rules of the Tenth Circuit Judicial Council Governing Complaints of Judicial Misconduct and 28 U.S.C., 372(c), the Judicial Council of the United States Court of Appeals for the Tenth Circuit has reviewed the April 17, 1995, order of Chief Judge Seymour[1] dismissing the captioned complaint of judicial misconduct and hereby affirms that dismissal.

The Circuit Executive is hereby directed to sign, enter and distribute this Order to all parties as Secretary to the Judicial Council.

The dismissal of the complaint is hereby AFFIRMED.

Appendix D

So ORDERED this 15th day of May, 1995.

S

Robert C. Hoecker

[1]Chief Judge Seymour took no part in the petition for review of her April 17, 1995 order.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
BYRON WHITE UNITED STATES COURTHOUSE
1823 STOUT STREET
DENVER, COLORADO 80257
(303) 844-3157
November 14, 1994

NOTICE OF JURISDICTIONAL DEFECT

DATE: November 14, 1994

RE: 94-2233, Salazar v. Daymon Associates, Inc., et al.

The court is considering summay dismissal of this appeal for lack of jurisdiction.

In the opening brief on the merits, Appellant(s) shall discuss the following jurisdictional issue(s):

Whether the order being appealed is a final appealable order? See 28 U.S.C., 1291.

Appellee(s), by the time the opening brief of Appellant(s) is to be filed, shall serve and file a memorandum brief, an original and seven copies, discussing only the jurisdictional issue(s).

Appendix E

Discussion shall contain citation to relevant legal authorities.

The answer brief of Appellee(s) shall not be filed until further order of this court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CARMEN G. SALAZAR,

Plaintiff,

vs. CIV. No. 94-753-JB

DAYMON ASSOCIATES, INC. and

THE PRICE CLUB, INC.,

Defendants,

FINAL JUDGMENT

THIS MATTER comes before the Court on Defendant The Price Club's ("Price Club") September 7, 1994 motion to dismiss or in the alternative, motion for summary judgment. The Court, having reviewed the submissions of the parties and the relevant law, and being otherwise fully advised in the premises, finds Price Club's motion is well taken and is granted.

Appendix F

As an initial matter, the Court notes that Plaintiff has yet to conduct process of service upon Defendant Daymon Associates, Inc. ("Daymon") as the Court mandated by order dated October 12, 1994.

Therefore, Plaintiff's claims against Daymon are dismissed without prejudice. Price Club is the only remaining defendant in this case.

Plaintiff, proceeding pro se, alleges violations of Title VII of the Civil Rights Act of 1964. She seeks $50 million in damages. Price Club has moved for summary judgment, contending that it has never been Plaintiff's employer and that Price Club and Daymon cannot be treated as a single entity for purposes of Title VII.

Summary judgment is appropriate only where no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-59 (1970). The movant bears the initial burden

of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U. S. 317, 322-23 (1986). The Court must view the record in the light most favorable to the existence of triable issues. Exnicious v. United States, 563 F2d 418, 423-24 (10th Cir. 1977).

In order to impose Title VII liability upon Price Club under the facts Plaintiff alleges in her complaint, she must show an employment relationship with Price Club, 42 U.S.C., 2000e-2(1988 & Supp. 1992), or alternatively, that Price Club and Daymon are a single entity. Frank v. U.S. West, Inc., 3 F. 3d 1357, 1361-64 (10th Cir. 1993). Price Club utilizes the services of Daymon as a conduit for competitive shopping information to its central buying departments. Daymon, not Price Club, employed Plaintiff as an Albuquerque area "competitive shopper." The only allegation Plaintiff makes concerning Price Club's responsibility is that the manager of the Albuquerque Price Club

operations branch somehow "affected decisions to hire, direct, [and] discipline" Plaintiff. Complaint P. 4. She provides no evidence from which to raise a genuine issue of material fact as to whether Price Club was her employer or is otherwise responsible for the acts of Daymon. Plaintiff's complaint indicates that Daymon independently made all decisions affecting Plaintiff's employment. Price Club had no supervisory responsibility over Plaintiff and made no decisions regarding, or had any influence over, her hiring, salary, benefits, or discipline. In addition, Price Club and Daymon are completely separate entitities with no common ownership, management, expenses, or employees. The two companies do not possess interrelated operations or have centralized control of labor relations, and therefore cannot be considered a single entity. Plaintiff's complaint against Price Club is accordingly dismissed.

Wherefore,

IT IS ORDERED, ADJUDGED, AND DECREED that Defendant Price Club's motion to dismiss or in the alternative, motion for summay judgment be, and hereby is, granted; Plaintiff takes nothing by her complaint.

IT IS FURTHER ORDERED that all other pending motions in this case be, and hereby are, moot.

IT IS FURTHER ORDERED that all future calendar settings be, and hereby are, vacated.

Dated this 21st day of December, 1994.

S

Juan G. Burciaga

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CARMEN G. SALAZAR,

Plaintiff, Civ. No. 94-753-JB/WWD

vs.

DAYMON ASSOCIATES, INC., and
PRICE CLUB, INC.,

Defendants

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon the Motion for Default and Judgment ("motion") and the Request to Clerk for Entry of Default filed by this pro se Plaintiff on August 16, 1994. The Price Company (incorrectly denominated "Price Club" in the Complaint) filed its response to Plaintiff's motion on August 18, 1994; and Daymon Associates, Inc.'s Opposition to Plaintiff's Motion for Default and Judgment was filed August 29, 1994.

THE MOTION FOR DEFAULT AND JUDGMENT

Plaintiff's motion and the attachments thereto show that service of the summons and complaint was attempted.

Nothing, except the bald unsupported assertions of Plaintiff, indicate that the service of summons and complaint in this cause was made on Defendant Daymon Associates, Inc. The affidavit of Gregorio R. Flores filed August 29, 1994, indicates that personal service of the summons and complaint was never made on Daymon Associates, Inc.

As early as August 24, 1994, counsel for Daymon Associates Inc. informed Plaintiff that Daymon had learned of the action through the Price Company but that it had not been served. Daymon's counsel offered to accept service of process; however, Plaintiff refused the offer. The Price Company filed its answer to the complaint on July 27, 1994. There is not even a colorable basis for arguing that a default judgment should be entered against the Price Company.

Although the Court is mindful of Plaintiff's pro se status, Plaintiff must realize that the Court will not tolerate completely groundless motions such as the Motion for Default and Judgment with respect to the Price Company. The Court will defer the question of sanctions in this instance; however, in the event that Plaintiff pursues such tactics in the future, this matter will be revisited.

WHEREFORE;

IT IS ORDERED that Plaintiff's Motion for Default and Judgment ("motion") and the Request to Clerk for Entry of Default be and they are hereby denied.

IT IS FURTHER ORDERED that on or before October 20, 1994 Plaintiff shall make service of the Summons and Complaint in this cause upon the attorney of record for Daymon Associates, Inc.

Entered October 12, 1994 S

Juan G. Burciaga

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
LOS ANGELES DISTRICT

Charge No. 345930858

Ms. Carmen Salazar
8911 Northeastern, N.E.
Apartment G202
Albuquerque, NM 87112

Charging Party

Price Club
Human Resources Department
4649 Morena Boulevard
San Diego, CA 92117

Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Acts of 1964, as amended and the Age Discrimination in Employment Act (ADEA) of 1967, as amended.

All requirements for coverage have been met.

Appendix H

The charge alleged discrimination in violation of Title VII and the ADEA in that she was subjected to harassment based on her sex, female, age, 46, and national origin, Hispanic, and subsequently laid off in retaliation for having complained of the discrimination.

Examination of the evidence failed to substantiate Charging Paty's allegations that she was discriminated against because of her sex, female, national origin, Hispanic, or her age, forty six (46). A review of the evidence reveals that the Charging Party was not harassed and was not subjected to a hostile work environment. Further review of the evidence shows that the Charging Party was laid off from her position as comparative shopper because her position was eliminated due to a reduction in force caused by economic conditions, not in retaliation for having reported the alleged discrimination.

A review of comparative data shows that during the same time period forty other similarly situated employees, of various national origins, male and female, most of them under age 40 were also laid off. A review of these records do not indicate that any of the 40 other employees laid off filed complaints of discrimination internally or with EEOC.

Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.

This determination and dismissal concludes the processing of this charge. This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission. Following this dismissal, THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF THE CHARGING PARTY'S RECEIPT OF THIS

LETTER. Therefore, if a suit is not filed within this 90 day period, the Charging Party's right to sue will be lost.

If the charge was filed within 180 days of the alleged discrimination (300 days in states with a state age discrimination law), Charging Party may sue under the ADEA for recovery of backpay, an equal amount as liquidated damages, appropriate makewhole or injunctive relief, and attorney's fees and court cost.

Dated May 26, 1994.

S/Patrick Matarazzo

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
LOS ANGELES DISTRICT

Charge No. 345930858

Ms. Carmen Salazar — Charging Party
8911 Northeastern, N.E.
Apartment G202
Albuquerque, NM 87112

Daymon Associates — Respondent
c/o Greg Flores, Personnel Director
18300 Von Karman Avenue
Irvine, CA 92715

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Acts of 1964, as amended and the Age Discrimination in Employment Act (ADEA) of 1967, as amended.

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Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the statute.

This determination and dismissal concludes the processing of this charge. This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission. Following this dismissal, THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT AGAINST THE RESPONDENT(S) NAMED IN THE CHARGE IN FEDERAL DISTRICT COURT WITHIN 90 DAYS OF THE CHARGING PARTY'S RECEIPT OF THIS

LETTER. Therefore, if a suit is not filed within this 90 day period, the Charging Party's right to sue will be lost.

If the charge was filed within 180 days of the alleged discrimination (300 days in states with a state age discrimination law), Charging Party may sue under the ADEA for recovery of backpay, an equal amount as liquidated damages, appropriate makewhole or injunctive relief, and attorney's fees and court cost.

Dated May 26, 1994.

S/Patrick Matarazzo

**AMENDMENT XIV TO THE UNITED STATES CONSTITUTION**

**SECTION 1.**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State herein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix I

(2)

FILED
AUG 16 1995
CLERK

No. 95-[redacted]94

In The
**Supreme Court of the United States**
October Term, 1994

CARMEN G. SALAZAR,
*Petitioner,*
vs.
THE PRICE COMPANY AND
DAYMON ASSOCIATES, INC.,
*Respondents.*

**ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(505) 884-8282
*Counsel for Respondent The Price Company*

BEST AVAILABLE COPY

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## QUESTION PRESENTED

The sole question presented as respects Respondent The Price Company is, as follows:

1. Did the Court of Appeals properly dismiss Petitioner's appeal from the District Court's memorandum opinion and order denying Plaintiff's motion for a default judgment because the District Court's order was non-final and, accordingly, the Court of Appeals lacked jurisdiction?

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No. 95-0994

In The

**Supreme Court of the United States**

October Term, 1994

CARMEN G. SALAZAR,

*Petitioner,*

vs.

THE PRICE COMPANY AND
DAYMON ASSOCIATES, INC.,

*Respondents.*

**ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The Order of the Court of Appeals dismissing the appeal is attached to the Petition as Appendix A. The Memorandum Opinion and Order of the District Court entered on October 12, 1994 denying Petitioner's motion for a default judgment is attached to the Petition as Appendix G. The Final Judgment of the

District Court entered on December 21, 1994 granting Respondent The Price Company's motion to dismiss and dismissing Petitioner's claims against Respondent Daymon Associates, Inc. for failure to conduct service of process is attached to the Petition as Appendix F.

## STATEMENT OF THE CASE

Petitioner's Statement of the Case is inaccurate, incomplete and replete with immaterial points.

Petitioner commenced this action on July 1, 1994. Respondent The Price Company filed its Answer on July 27, 1994. Appendix G to the Petition, page 2. The Petitioner nevertheless filed a Motion For Default and Judgment against both respondents on August 16, 1994. The District Court entered its Memorandum Opinion and Order on October 12, 1994, denying the motion. As respects Respondent The Price Company, the District Court found that The Price Company filed its Answer on July 27, 1994 and that "there is not even a colorable basis for arguing that a default judgment should be entered against The Price Company." Appendix G to the Petition, page 2. As respects Respondent Daymon Associates, Inc. ("Daymon") the District Court found that service of process had never been accomplished and directed Petitioner to serve Daymon's counsel on or before October 20, 1994. The effect of the District Court's order was merely to deny the motion for default judgment. There was no disposition of any of the claims in the Complaint against the two respondents.

Instead of serving Daymon as directed by the District Court, Petitioner filed a notice of appeal from the October 12, 1994

Memorandum Opinion and Order on October 20, 1994. Appendix "1" attached hereto. On November 14, 1994, the Court of Appeals raised the issue of whether the order being appealed from was a final, appealable order, and directed the parties to brief the jurisdictional issue. Appendix E to the Petition. The District Court entered a Final Judgment on December 21, 1994, granting Respondent The Price Company's motion to dismiss or, in the alternative, motion for summary judgment. Appendix F to the Petition. The Final Judgment resolved all claims against all parties. The Petitioner filed no notice of appeal from the Final Judgment. On March 30, 1995, the Court of Appeals determined that the Petitioner's appeal from the District Court's denial of her motion for a default judgment was jurisdictionally defective because the order appealed was not a final, appealable order. Appendix A to the Petition.

Contrary to Petitioner's characterization of the case, this is not a case of "conspiracies" among the Equal Employment Opportunity Commission, District Court and Court of Appeals and the respondents to violate Petitioner's constitutional rights. Nor is it a case of "undue influence" or "judicial decision-making" by the respondents. This is simply a case where the Petitioner refused to comply with the District Court's order to serve Daymon, instead filed a premature appeal, then failed to file a timely appeal when a final judgment was entered, despite being alerted to the jurisdictional defect by the Court of Appeals.

———o———

## REASONS FOR DENYING THE PETITION

### I. The Petition Fails To Involve Any of the Considerations Governing Review Under Sup. Ct. R. 10.1

The considerations governing review on writ of certiorari are set forth in Sup. Ct. R. 10.1, and do not include the circumstances involved in this case. While Petitioner alleges that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings in sanctioning a lower court's decision as to call for an exercise of this Court's power of supervision," even a cursory review of the opinions below demonstrates that this is a baseless contention.

### II. The District Court's Order Denying The Petitioner's Motion for Default Judgment Was Not An Appealable Order.

The Court of Appeals has jurisdiction over "all final decisions of the district courts" pursuant to 28 U.S.C. §1291. Denials of motions for default judgment are not final appealable orders. ***Bird v. Reese,*** 875 F.2d 256 (9th Cir. 1989). Such denials do not terminate the litigation on the merits but rather leave the litigation in place. ***McNutt v. Cardox Corporation,*** 329 F.2d 107, 109 (6th Cir. 1964). Since there was no final decision, Petitioner's appeal was premature and was required to be dismissed.

Petitioner argued that the District Court's order was appealable under the "collateral order" exception to the final judgment requirement. See ***Cohen v. Beneficial Industrial Loan Corporation,*** 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The Court of Appeals considered this contention and determined that no exception applied. Appendix A to the Petition. This

exception applies to "claims of right separable from, and collateral to, rights asserted in the action." ***Cohen***, 337 U.S. at 546. The decision appealed from must not be of a "nature as to affect, or be affected by, decision of the merits." ***Id.***

In ***Desktop Direct, Inc. v. Digital Equipment Corp,*** 993 F.2d 755 (10th Cir. 1993), the Court reviewed the requirements which must be satisfied in order for the "collateral order" exception to apply. 993 F.2d at 757. These are that: 1) it must conclusively determine the disputed questions; 2) it must resolve any important issue completely separate from the merits of the action, and 3) it must be effectively unreviewable on appeal from a final judgment. The District Court's Order did not conclusively determine any of the disputed questions regarding Petitioner's claim of employment discrimination. More importantly, however, the denial of the motion for a default judgment could be effectively reviewed on appeal from a final judgment. Thus, this case did not meet the ***Cohen*** exception requirements.

**III. Fed. R. App. P. 4(a)(2) Does Not Permit a Notice of Appeal from an Interlocutory Decision to Serve as a Notice of Appeal from a Final Judgment**

Rule 4(a)(2) of the Federal Rules of Appellate Procedure provides:

> Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(Emphasis added)

Petitioner contends that the Court of Appeals departed from accepted and usual judicial proceedings in determining that her October 20, 1994 notice of appeal from the District Court's Memorandum Opinion and Order entered on October 12, 1994 did not operate pursuant to Rule 4(a)(2) as a notice of appeal from the Court's December 21, 1994 Final Judgment. Contrary to Petitioner's contention, the Court of Appeals correctly applied the law established in this Court's prior decisions. First, Petitioner's notice of appeal specifically stated that it was from "the order and opinion for the Motion for Default and Judgment, entered in this action on the 12th day of October, 1994." See, Appendix '1', Petitioner never filed a notice of appeal from the December 21, 1994 Final Judgment. Moreover, Rule 4(a)(2) permits a notice of appeal from a non-final decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment. Rule 4(a)(2) does not permit a notice of appeal from a clearly interlocutory decision--such as the District Court's denial of Petitioner's motion for default judgment--to serve as a notice of appeal from the final judgment. The United States Supreme Court's decision in ***FirsTier Mortgage v. Investors Insurance Company***, 498 U.S. 269 (1991), is on point. In that case, this Court first noted that Rule 4(a)(2) refers to a notice of appeal filed after the announcement of a decision designated in the notice of appeal. 498 U.S. 275, fn. 4. Here, Petitioner's notice of appeal only refers to the October 12, 1994 order denying her motion for default judgment. Hence, it cannot operate under Rule 4(a)(2) as a notice of appeal from the December 21, 1994 Final Judgment which granted Respondent's Motion to Dismiss or for Summary Judgment. Secondly, Rule 4(a)(2), on its face, only applies to a notice of appeal filed after a decision is announced by

the district court but before the entry of the order on the decision. Here, Petitioner filed a notice of appeal from the October 12, 1994 order denying her motion for default judgment. She did not file a notice of appeal after the announcement by the District Court of a decision on Respondent's motion to dismiss or for summary judgment, which is the subject of the December 21, 1994 Final Judgment. "Rule 4(a)(2) does not confer jurisdiction upon a Court of Appeals unless the appellant has filed a notice of appeal after the announcement of judgment but before the entry of the order." ***General Television Arts, Inc. v. Southern Railway Company,*** 725 F.2d 1327 (11th Cir. 1984) (Emphasis in original). The Court in ***General Television*** further held that "a final judgment does not retroactively validate [a] premature notice of appeal." ***Id.***

Thirdly, this Court in ***FirsTier Mortgage*** made it clear that Rule 4(a)(2) does not permit notices of appeal from clearly interlocutory decisions to serve as notices of appeal from a later final judgment. As stated by the Court:

> . . .Rule 4(a)(2) was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment.
>
> This is not to say that Rule 4(a)(2) permits a notice of appeal from a clearly interlocutory decision--such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure--to serve as a notice of appeal from the final judgment. A belief that such a decision is a final judgment would *not* be reasonable. In our view, Rule 4(a)(2) permits a notice of appeal from a

> non-final decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment.

498 U.S. at 276. (Emphasis added.)

The October 12, 1994 Memorandum Opinion and Order merely denied Petitioner's motion for default judgment. As such, it was not a final judgment as to any of the claims or any of the parties, and it was clearly an interlocutory decision. ***See, Bird v. Reese***, 875 F.2d 256 (9th Cir. 1989); ***McNutt v. Cardox,*** 327 F.2d 107, 109 (6th Cir. 1964) (orders denying motions for default judgment are non-final, non-appealable, interlocutory orders). Moreover, the Court of Appeals clearly alerted Petitioner to the fact that her October 20, 1994 notice of appeal suffered from a jurisdictional defect because there was no final judgment. See, Appendix E to the Petition. Despite such notice, Petitioner filed no notice of appeal from the December 21, 1994 final judgment. Pursuant to the Supreme Court's holding in ***FirsTier Mortgage,*** the October 20, 1994 notice of appeal could not serve as a notice of appeal from the December 21, 1994 final judgment, and the Court of Appeals properly determined that it had no jurisdiction. 498 U.S. at 276.

## IV. The Final Judgment Entered On December 21, 1994 Did Not Render the Jurisdictional Defect Relating to Petitioner's Notice of Appeal Moot

As discussed above, the notice of appeal filed on October 20, 1994 cannot serve as a notice of appeal from the District Court's Final Judgment entered on December 21, 1994, and the Court of

Appeals was without jurisdiction to consider whether the December 21, 1994 decision was proper. The Court of Appeals was also asked to consider if it had jurisdiction to hear the appeal from the district court's October 12, 1994 memorandum opinion and order in light of the subsequent entering of a final judgment. Petitioner argued that the jurisdictional issue was moot. However, there is again on-point authority holding to the contrary.

In ***Strasburg v. State Bar of Wisconsin,*** 1 F.3d 468 (7th Cir. 1993), an appeal was taken from the district court's order which granted summary judgment as to one defendant, but which dismissed without prejudice the claims against several other defendants because they were not served with process within 120 days of the filing of the complaint, and which allowed the plaintiffs thirty days to refile and accomplish service. The district court stated that if the plaintiffs did not accomplish service, the dismissal of the complaint would be amended to be with prejudice, and final judgment would be entered in favor of all the defendants. The plaintiffs did not serve the remaining defendants but instead filed several motions and a notice of appeal. The district court subsequently denied all the motions and dismissed the action with prejudice, directing the clerk to enter final judgment. 1 F.3rd at 469-470.[1]

Under circumstances indistinguishable from this case, the Court in ***Strasburg*** held first that the announced decision referenced in Rule 4(a)(2) must bear "some close relation to the final judgment, or else litigants would save themselves the trouble

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[1] Similarly, in this case, the October 12, 1994 Memorandum Opinion and Order denied Petitioner's motion for default judgment and directed the Petitioner to serve Daymon Associates by October 20, 1994. Instead of doing what the District Court directed, Petitioner filed a notice of appeal on October 20, 1994. Two months later, the District Court granted Respondent The Price Company's motion to dismiss or for summary judgment, dismissed the claims against Daymon Associates for failure to accomplish service of process, and directed the entry of final judgment.

of determining which document is the final judgment, and simply appeal the first decision handed down on any matter by the district court." 1 F.3d at 471. The Court then held that "patently interlocutory decisions, such as discovery rulings or sanction orders, do not merit the saving provisions of Rule 4(a)(2)." 1 F.3d at 472, citing ***FirsTier,*** 498 U.S. at 276. As stated by the Court: "[T]he central question is whether the district court has announced a decision purporting to dispose of all of the litigant's claims." Id. The Court in ***Strasburg*** determined that the district court's decision, which on its face conditioned the final disposition of the suit and invited the plaintiffs to refile and accomplish service on the defendants within thirty days, could not reasonably have been understood as a final order. Accordingly, the Court in ***Strasburg*** held that the notice of appeal was premature, did not relate forward to the date of entry of the final judgment, and did not confer jurisdiction on the appellate court.

The circumstances in this case are even more compelling than those in ***Strasburg***. Here, the District Court's October 12, 1994 order merely denied Petitioner's motion for a default judgment. Unlike ***Strasburg***, no claims were dismissed and nothing needed to be refiled. Just as in ***Strasburg***, the District Court here directed the Petitioner to serve one of the defendants. It could not have been clearer that Petitioner's claims against both defendants remained to be determined, and that further action would be taken by the District Court. Just as in ***Strasburg***, the Petitioner's notice of appeal was premature, it could not relate forward to the entry of the Final Judgment on December 21, 1994, and the appeal was required to be dismissed for want of jurisdiction.

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## CONCLUSION

For the reasons stated above, Respondent The Price Company submits that the Petition presents no issue which is appropriate for the issuance of a Writ of Certiorari. Accordingly, Respondent requests that the Court deny the Petition.

Respectfully submitted,

KELEHER & McLEOD, P.A.

By_____

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APPENDIX

CV94-753-JGB

UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

Carmen G. Salazar, Plaintiff

vs.

Daymon Associates, Inc.

and

The Price Company, Defendants

NOTICE OF APPEAL

Notice is hereby given that Carmen G. Salazar, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the order and opinion for the Motion for Default and Judgment, entered in this action on the 12th day of October, 1994.

Carmen G. Salazar, Plaintiff
Rt. 5, Box 219
Santa Fe, New Mexico 87501